POINT K.

The power to reject executory contracts (including leases) is vested in the Trustee, and it is not a legal prerequisite that he obtain authority so to do from the Court.

In 4 Collier on Bankruptcy (14th Ed.) Section 70.43, the text writer, after a careful discussion of the applicable general principles and analogies and stating that however persuasive such general principles and analogies may seem to be applied in the light of Section 70(b) says at page 1233:

> "Hence, it cannot be considered as the intent of the Act that the trustee in order to reject an executory contract should first apply to the bankruptcy court and act by express order of the Court, It may be safe and wise to do so, but it is not a legal prerequisite, as it is under the more authoritative case law dealing with abandoment of other burdensome property not affected by Section 70(b)."

Even though it were contended that a Trustee could not *affirmatively* reject an executory contract without authority of the Court, it could hardly be reasoned that where contracts are "deemed to be rejected" under the statute by reason of the failure of the Trustee to either assume or reject the bankruptcy court has power and authority to reach out and bring back at the expense of the contracting parties rights conferred upon the bankrupt under executory contracts, deemed rejected, and the burdens of which have been carried by third parties under a claim of right.

Further the text writer in Remington on Bankruptcy (4th Ed.) Section 1209.02, page 95, states:

> "Subdivision (b) of Section 70, 11 U. S. C. A. Section 110(b) is so drawn as to permit the inference that the trustee can of his own motion without seeking the authority of the court, *** reject a lease. The wording of subdivision (b) is to be contrasted with that of Sec-

tion 116 (1), of the Bankruptcy Act 11 U. S. A. C. Section 516 (1), which authorizes a reorganization court to *permit* the rejection of executory contracts. Prior to the amendment of 1938, it was held in some circuits that the trustee ought to get the authority of ratification of his court."

As above stated, it is our opinion that the statement of text writers and of the Court are applicable to affirmative act of the Trustee in rejecting executory contracts and not to the situation created by his failure to either assume or reject, and in any event where contracts are "deemed rejected", no authority of the court is necessary.

POINT L.

The Trustee in Bankruptcy must obtain authority of his Court to assume a lease.

As opposed to the rule that the power to reject executory contracts is vested in the Trustee the rule with regard to power to assume a contract may be exercised by the Trustee only with the authority of the Court. The relative importance of the matter of the assumption of executory contracts is much greater than the rejection thereof. In this case it should be noted that an assumption of liabilities results in an increased charge to the estate of expenses enjoying the first rank of priority adds significance to the silence of Section 70(b) regarding the report of contracts assumed by the trustee. The general rule that economy of administration calls for close, strict, and active control by the court of all administrative expenditures leads to the conclusion that it is improper for a trustee to assume executory contracts on his own responsibility.

As is said in 4 Collier on Bankruptcy (14th Ed.) Section 70.43, page 1233:

> "He should consider the advisability of assuming a contract according to his best judgment and give the court all the benefit of his practical experience, if any. But the proper procedure is for the Trustee to apply to the Court for an order authorizing him to assume the contract if this is what his judgment advises him is the proper course. The Court should pass upon his application after notice to and a hearing of creditors and probably also the other party to the contract.
>
> In deciding whether or not a contract should be assumed, the prospective benefit to the estate is an important, if not the decisive, consideration. But it should not be overlooked that normally such assumption entails the assumption of liabilities and in this connection it should be carefully considered whether or not the estate, either due to the assumption of the contract or possibly with the help of other available funds, is financially in a position to accept liabilities as a first charge on the estate."

Not only is the rule well established that a trustee in bankruptcy must obtain the Court's authority in order to assume a lease, but here the trial court recognized and followed that rule in determining whether respondent's lease with option to purchase had been assumed or rejected. There is no basis of fact or law upon which the other executory contracts and leases of the bankrupt, are not in the same category as the lease with option to purchase which the Court "deemed to be rejected."

All of the bankrupt's leases and executory contracts have to stand or fall, depending upon whether they were assumed or rejected within the statutory period. There was no extension of that period by the Court and as previously shown herein there are no facts or circumstances making the rule inapplicable.

The Court stated in *In Re: Northern Indiana Oil Company, Inc.*, 65 Fed. Supp. 167, at page 168, Col. 2:

> "And regardless of such finding, there is nothing in the record of the proceedings to indicate that the Trustee received authority from the Referee to assume the contracts. Collier on Bankruptcy says:
>
> "It is improper for a Trustee to assume executory contract on his own responsibility." 4 Collier on Bankruptcy (14th Ed.) page 1233). *My own views are in accord with that statement.*" (Emphasis ours).

Even in the absence of the determination of the Court as to the leases being rejected, it is well established that the assumption of a lease is an act requiring notification by the Trustee of the parties concerned.

The evidence and the findings establish that no notice of any kind was ever given to any of bankrupt's lessors or any of the other parties to the executory contracts in effect when the petition in bankruptcy was filed. In fact, the evidence discloses that the Trustee resisted, to the very last, all efforts to require him to attempt to assume leases and contracts or request the turn-over of any property; that in his best judgment and after a careful investigation, the property sought to be recovered by him would be burdensome to the estate, there being no funds on hand or available with and out of which to meet the burdens of the respective contracts.

The lessors and other contracting parties were never made parties, nor were they ever before the Court, which now is attempting to establish that the leases and contracts were in fact assumed and are assets of the bankrupt estate in the face of the "*cum onere*" rule. None of the conditions contained in the leases and contracts on the part of the bankrupt to be performed were ever performed by the Trustee, or offered to be performed. He had no funds. He decided they were burdensome. He declined to take the property over.

Now, the burdens of and liabilities under the leases and contracts having been borne by respondent, the Court would draw back and make assets of the bankrupt estate, the properties lost by rejection.

As was well said by the Court in *Gerstel* v. *Shaw* (C.C.A. 5th), 71 Fed. (2) 371:

> "It is plain that Miss Shaw does not claim under the bankrupt, but adversely to him and in right of her grantor, and has exercised a right of entry which the trustee if in possession could not justly have resisted without at least paying up the defaults. He in fact has, as the bankrupt then had, no means to do so. He does not now propose to adopt and reinstate the lease, but assume that he would have a right to operate the hotel without doing so in hopes of making some money for the estate. In this he is in error. The judge rightly held that he is in no position to take over and reinstate the lease and should abandon his effort."

Here, likewise, the Trustee not only does not now propose to adopt and reinstate the leases but he is in hopes of taking over and making an asset of the bankrupt estate, all of the property and earnings produced by the respondent without his ever being subject to any of the burdens of the executory contracts and leases.

Surely in the face of the evidence and findings in this case, should be other parties to the executory contract, and the lessors attempt to establish that the leases and contracts were as a matter of fact adopted by the Trustee and attempt to recover all amounts due thereunder they would be confronted with this record showing a determination by the Trustee not to assume and the holding of the Court that the Trustee not having assumed or rejected the contracts and leases, the same stand rejected.

POINT M.

The failure of a Receiver or Trustee in Bankruptcy within a reasonable time (now fixed by Section 70(b) of the Bankruptcy Act at sixty days) to assume the leasehold results after its exercise in disconnecting him entirely from the lease. He thereafter neither holds or holds over as a tenant under it, his rights in the demised premises are terminated and he has no right to continue in possession. If not terminated for some other cause than rejection by the Receiver or Trustee, leaseholds remain the Bankrupt's and the Bankrupt is free to retain possession thereunder or abandon such leasehold if it chooses, but the Bankrupt Estate and the Trustee thereof have no further interest.

The foregoing statement is a quotation from *Green* v. *Finnigan Realty Co.,* (C.C.A. 5th) wherein the Court further says:

> "The court through its officer having chosen to reject the lease had neither rights nor obligations under it."

The main purpose of Section 70b of the Act is to clarify at the earliest possible moment the mutual relations of the contracting parties. Hence, if the Trustee rejects or is deemed to have rejected a contract, the other parties is entitled to rely upon the rejection and to act accordingly. As was said in the matter of *Green* v. *Finnigan, supra*:

> "When a tenant disclaims to hold under a lease he becomes a trespasser and his possession is adverse and is open to the action of his landlord as a possession acquired originally by wrong. The Act is conclusive on tenant; he cannot revoke his disclaimer and adverse claim so as to protect himself during the unexpired term of the lease; the relation of landlord and tenant is dissolved, and each party is to stand upon his own right."

Here the action of the Trustee flies squarely in the face of the foregoing holding. He disclaimed to hold under the leases by his rejection thereof and thereby became a trespasser and his possession adverse and he is open to the action of the lessors as a possession acquired originally by wrong. He cannot now revoke his disclaimer so as to protect himself during the unexpired terms of the leases. As a matter of fact it might be noted in the passing that the evidence discloses that the leases on parking lots were from month to month and terminable under the Indiana law at any time on thirty days' notice given by either the lessor or lessee. So that even in the absence of a rejection by the Trustee and an assumption thereof, the most that could have been obtained as against the lessors would be a thirty-day occupancy. Further, in recognition of their rights to possession as against the Trustee, the evidence and findings disclose they exercised their right of dominion over the property and leased the same to respondent.

Under the Bankruptcy Act, as elsewhere, the effect of a rejection, actual or constructive, is that such rejection constitutes a breach of contract giving the other party the right to claim damages.

In *Central Trust Company of Illinois* v. *Chicago Auditorium Corporation,* 60 Law Ed. 811, at page 814, the Supreme Court recognized and adopted this rule and said at Col. 2, page 815:

> "* * * Where a party bound by an executory contract repudiates his obligation * * * the promisee has an option to treat the contract as ended * * * and maintain an action for damages * * *. The contract was assignable and passed to the Trustee under Section 70(a) *to the extent that it had an option to perform in place of the bankrupt.* * * * still the Trustee in bankruptcy did not elect to assume performance and so the matter is left as if the law had conferred no such election * * *". (Emphasis ours)

POINT N.

After a tenant disclaims to hold under a lease or declines to take under it, as here, where Trustee rejected the lease, the Lessor has a right to possession which the tenant (Trustee) is estopped to deny.

This principle is recognized and reaffirmed by the Courts in the case of *Green* v. *Finnegan Realty Co.* and *Willison* v. *Watkins,* hereinbefore considered.

POINT O.

Findings of fact will be set aside if clearly erroneous.

As provided by Rule 52 (a) Rules of Civil Procedure, 28 U. S. C. A. Foll. 723 (c) page 77:

> "Findings of fact will be set aside if clearly erroneous."

POINT P.

Findings of fact are not binding on the Appellate Court, even though supported by some substantial evidence if they are clearly against the weight of the evidence, or were induced by an erroneous view of the law.

Findings of fact are not binding upon the Appellate Court even though supported by some substantial evidence if they are clearly against the weight of the evidence or induced by an erroneous view of the law. This rule was recognized and applied in *Home Life Insurance Co.* v. *Madere,* 101 F (2d) 292, 294. It is also well established that in an equity appeal the obligation of reviewing the record rests on the Court as held in *Lawren* v. *Lowe,* 46 Fed. (2) 303, 304, and the conclusions of law must follow the findings as held in *U. S.* v. *Harris,* 77 Fed. 821.

POINT Q.

An express covenant that an assignment by operation of law or the Bankruptcy of a specified party thereto, or of either party, shall terminate the lease or give the other party an election to terminate the same, shall be enforceable.

We further believe that the rule that an express coveant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party the election to terminate the same shall be enforceable. The rule has been laid down by Congress in Bankruptcy Act, Sec. 70b, 11 U. S. C. A. 110 (b) and has been uniformly followed.

POINT R.

The fact that a District Court in bankruptcy orders its Trustee to file a petition for turn-over of leaseholds after the expiration of the period for the adoption or rejection thereof by the Trustee, does not serve to renew the rights of the Trustee of the Bankrupt Estate in and to said leaseholds by reason of the specific provisions of Section 70(b) of the Bankruptcy Act, 11 U. S. C. A. Sec. 110(b) and does not serve to give unto the Court power to exercise summary jurisdiction.

Petitioner suggests that there is a conflict between the decision in the case at bar, and the decision of this court in *Brown* v. *O'Keefe,* 300 U. S. 598, and particularly a conflict between the interpretation of Section 70b by the Court below and the interpretation placed upon Section 39c by this Court in *Pfister* v. *Northern Ill. Fin. Corp.,* 317 U. S. 144 and cites other holdings as being in conflict, but in our opinion, they are not in point.

The O'Keefe case involved burdensome property, title to which vests in the trustee upon adjudication, which title is divested only upon the trustee affirmatively disclaiming it, and such disclaimer may be done by the Trustee only by authority of the court of his appointment. 4 Collier on Bankruptcy, Sec. 70.42, Pg. 1216, 1220.

However, the bankrupt's estate, with all the liabilities attached, does not pass to the Trustee en bloc, with respect to executory contracts, "including unexpired leases of real property", the transfer does not operate until the contract has been definitely adopted. 4 Collier on Bankruptcy, Sec. 70.42, Pg. 1216 middle; Sec. 70.44, pg. 1237 bottom.

In the *Pfister* case, *supra,* this court speaking through Mr. Justice Reed, said:

> "The entire process of * * * liquidation is open to re-examination out of time by the District Court, *in its discretion, and subject to intervening rights.*" 87 L. Ed. 152 Col. 2.

Here, respondent Fletcher was in possession at the time of the filing of the involuntary petition on April 26, 1945, claiming an interest in the property held, his position was recognized as valid by the Trustee who not only failed to adopt or reject the leaseholds in question within 60 days from the date of entry of the order of adjudication, but who asserted no claim whatsoever to the property involved until January 29, 1948, or two years eight and one-half months later, and then by reason of pressure applied by the Court and against his better judgment.

During all of this period, respondent relied upon the rejection of the executory contracts, as he was entitled to do. Collier on Bankruptcy (14th Ed.) Sec. 70.41 Pg. 1236; *Planter Oil Co.* v. *Gresham,* (Tex. Civ. App.) 202 S. W. 145, 42 A. B. R. 29, and built a more or less profitable business out of the wreckage left by the bankrupt. Now, the

Trustee seeks to profit by his own inaction and recover what he abandoned, together with any and all profit which may have been realized through respondent's efforts and his alone. In other words, he seeks to now claim all the benefits without ever having assumed any of the burdens. Surely to condone such procedure by an officer of the Court and exercise summary jurisdiction would beyond all question, be an abuse of discretion.

Further, the enactment of sub-b of Sec. 70 in 1938 was merely declaratory of the case law prior to 1938. *Green* v. *Finnigan, supra.* Under the law prior to such enactment, action by the Trustee, delayed for nearly three years, would, under the authorities, be deemed to be unreasonable.

As is stated by the text writer in 4 Collier (14th Ed.) Sec. 70.43 pg. 1236 which statement was approved by the Court below (R. 614, Par. 4) "It is the main purpose of Section 70b to clarify at the earliest possible moment the mutual relations of the contracting parties. Hence if the Trustee rejects or is deemed to have rejected a contract, the other party is entitled to rely upon the rejection and to act accordingly." The respondent Fletcher did so rely on the rejection.

Too, there is an absence of analogy between a decision enabling a Court to review proceedings and a construction of a statute which would permit the divesting of intervening vested rights.

POINT S.

The Supreme Court will not take, on certiorari, cases fully heard and adjudicated below for the mere purpose of examining the result.

Petitioner in his brief sets forth as reasons for the granting of the writ sought alleged conflicts between the decision in the case at bar and the O'Keefe case decided by this

Court and alleged conflicts between said decision and the decisions of other circuits. As hereinbefore shown, no conflict exists between the decision in the *O'Keefe* case and in the face of the intervening rights of the respondent the theory of the rulings as to the construction of Section 39c are not applicable.

This Court will exercise its power of certiorari sparingly and with caution and issue its writ only in matters of great public interest. Its position was well stated by Mr. Chief Justice Taft in *Magnum Import Company* v. *Houbigant, Inc.*, 262 U. S. 159; 67 Law Ed. 922, 43 Sup. Ct. 531:

> "The question how the Court should exercise this power (to issue writ of certiorari) next arises. The jurisdiction to bring up cases by certiorari from the Circuit Court of Appeals was given for two purposes; first, to secure uniformity of decision between three courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing."

And further as said by Mr. Justice Roberts in *Deputy* v. *DuPont*, 308 U. S. 488, 84 L. Ed. 416, 60 S. Ct. 363:

> "The function of this court is to resolve conflicts of decision and to settle important principles of law. The discretionary power of this court to review judgment of lower Federal Courts was not intended to be exercised in every case where these courts have adjudicated the conflicting claims of the parties, which involves no important principle of law and no conflict of decision amongst the Federal Courts. * * * we will not take cases fully heard and adjudicated below for the mere purpose of re-examining the correctness of the result."

CONCLUSION.

It Is Therefore Respectfully Submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for writ of certiorari should be denied.

HARRY LONG,
Counsel for Respondent.

Office - Supreme Court, U. S.
FILED
SEP 13 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1949.

No. 188

In the Matter of
NORTHERN INDIANA OIL CO., INC.,
an Indiana Corporation,
Alleged Bankrupt.

CHARLES L. SURPRISE,
Trustee in Bankruptcy,
Petitioner,

vs.

ROBERT B. FLETCHER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITIONER'S REPLY BRIEF.

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• • •

"The Circuit Court of Appeals did not purport to make an independent evaluation of Maggio's evidence bearing on his incapacity to obey the turnover order. *It was beyond its power to do so.* The Circuit Court was not at large. *Its power was limited to a consideration of the justifiability of the District Court's findings on the basis of the record before that court.*" (Our emphasis.)

Justice Frankfurter in dissenting opinion in *Maggio* v. *Zeitz.*

In Re: Luma Camera Service, Inc., 333 U.S. 56, 68 S. Ct. 401, on bottom of page 418 of S. Ct. Reporter.

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PETITIONER'S REPLY BRIEF.

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Corrections of Appellee-Respondent's Statement.

In such a case as the instant one, which involves a palpable fraudulent transaction, accompanied by brazenly invoking the bankruptcy act itself on premises of false, nonexisting and distorted facts; it is not surprising to find the respondent appellee again resorting to a series of mis-statements of fact in his brief.[1]

Having successfully misled the Court of Appeals as to the merits in regard *to the fraudulent nature of the transaction* (until the petition for a rehearing was filed), the respondent appellee boldly reasserts the same mis-statements of fact before this honorable court.

However, there is no *real controversy as to the facts* in this case when *they are honestly and sincerely presented.* As the Circuit Court of Appeals pointed out, *that the findings in the main are not in dispute* and give a fairly accurate record of the situation. (R. 605) Had the lower court included all of the findings of the District Court, particularly, *findings* 6, 18 and 25, it would not have *been misled* in holding that the District Court lacked summary jurisdiction.

Mis-statement, that the Trustee Entered Into a New Agreement or Contract With Respondent. Page 5, Respondent's Brief.

Probably the most rash statement of fact is contained on page five of respondent's brief at the bottom of the page:

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[1] The attorney appearing before the Supreme Court for respondent is not the attorney of record below. The attorney for the respondent below is Mr. Fred F. Eichhorn, of the firm of Draper & Eichhorn of the City of Gary.

> "There upon, respondent entered into an agreement with the trustee to pay, as rental for use of the *tangible personal property including trucks, etc., and exclusive of the lease holds,* a rental of $100.00 per month and thereafter, for a period of 20 months, ending at the end of 1946, the respondent paid such rental. (R. 133-135, 20, 233-234, 301, 303, 306-309, 311-313, 315.)" (Our emphasis)

The Judge of the District Court found this statement to be utterly untrue and the evidence in the record does not support this *outrageous* statement. The Trustee *did not enter into any new lease arrangement with the respondent* after his appointment, either written or oral. When faced with the possibility of having to surrender the entire property of the bankrupt, the respondent attempted to convince the Judge of the District Court of such a new arrangement between himself and the Trustee, subsequent to and after 60 days of adjudication.

Upon having failed to convince the District Court, the respondent *sought refuge* under section 70b of the Bankruptcy Act, claiming a "technical rejection" of his lease. This claim, to be under the protection of section 70b, *was asserted after acknowledging the trustee as his landlord,* according to his own statements, for *a period of more than eleven* (11) *months after* adjudication, which took place on May 14, 1945.

This alleged rejection, under the Act, was asserted, according to respondent's own statement, *on the 8th day of April,* 1946. The Judge of the District Court, being fully cognizant of the fraudulent nature of the respondent's possession, *scorned* this technical argument of the respondent.

However, the record, by the testimony of the respondent himself, shows a definite agreement of assumption *between the trustee in bankruptcy,* the trustee herein, and the respondent, Fletcher.

> "The question came up there about affirming or disaffirming the lease, and, as I recall, I went into the condition of things pretty thoroughly with Mr. Surprise (Trustee) and he took the position that I would have to go along under the lease. It was mutually understood that the lease was still in effect." (Tr. 309)

Mis-statement, As to the Value of Bankrupt's Business.

Another mis-statement of fact is found on page three (3) of respondent's brief:

> "That the business operated by the bankrupt was a losing one from its inception."

This statement is untrue. It is a smokescreen calculated to mislead the court and to pacify creditors on the theory that these valuable assets were worthless anyway—*"a dead horse."* The trial court saw through this assertion which is made to hide *the stripping of the entire assets of* the bankrupt corporation. This business started from a meager investment consisting of a $200.00 credit in the purchase of a second hand oil truck in 1936. (R. 222) It grew rapidly in spite of O.P.A. restrictions and gasoline rationing during the war. Soon it became a corporation, which, on the date of the filing of the Petition of Bankruptcy, had an operating business alone valued at at least $20,000.00. This corporation consisted of the operation of *seven parking lots, four filling stations, one combination restaurant, filling station and trailer camp,* together with a fuel oil retail business. (R. 223)

During the course of the operation of their business, this corporation promoted and erected a valuable filling station, valued at $50,077.37, which was almost entirely done by financing through a loan arrangement and was self-liquidating. This filling station is designated in the lease option as filling station number six, and the title to which was and is being held in the name of the President's, J. Ralph Snyder's, son. (R. 180-185)

On top of this, large sums of money, totaling approximately $11,500.00 were expended by the corporation during its existence, for the promotion of filling station outlets, grading of parking lots, installation of fences, lights and shelter huts and improvements in regard to the trailer camp operation.

Had its *investments* and *improvements*, and the erection of filling station number six (6) been reported to the Treasury Department by the president of the corporation, its income tax reports for the years immediately preceding bankruptcy, would have reflected a different story.

Mis-statement, that the Trustee Did Not Pay the Rents on Underlying Leaseholds and, Thus, Brought About Their Termination.

The statement contained in respondent's brief, at the bottom of page four:

> "At no time, from the date of adjudication, did the trustee pay rent for any of the leased lots to the bankrupt."

This statement begs and evades the question. The lease option executed within four months of the filing of the Petition of Bankruptcy *specifically provided that the re-*

spondent pay the rentals to the underlying lessees, the bankrupt's lessors.

It was part of the underlying consideration of the respondent's lease. The said lessors had full knowledge of the respondent's position as a tenant of the bankrupt, and, subsequently, of the trustee in this case.

The underlying lessors accepted the rents due on the bankrupt's underlying leases, from the hands of the bankrupt's tenants *as provided for in the lease.*

(Finding 25, R. 544):

The *significance* of this *mis-statement* of fact in respondent's brief, which involves the rights of the underlying lessors, *is glaringly brought into relief* when it is borne in mind that the landlords of the said underlying leases on all of the parking lots and the gas station number six, described in respondent's lease, consisted of the *president,* the *dominant stockholder* of the bankrupt's corporation, *members of his immediate family* and/or family corporation, *the Gary Publishing Company.* (R. 146, 314, 414)

Incidentally, it is these same properties which are the subject matter of other litigation wherein the trustee is seeking to quiet title to these same parcels of real estate to which the said underlying lessors have legal title. (R. 344)

Mis-statement of facts concerning a Five Thousand Dollar *concealment of the bankrupt's funds* by the respondent and the bankrupt's president, which five thousand dollars *was never scheduled or paid over* to the corporation or the trustee,

("The lease provided for a $5,000 deposit by the lessee to guarantee his performance of the terms of the lease, but Fletcher, instead of making the deposit with the corporation, deposited the $5,000 with the president of the corporation personally." (Finding 25, record page 546).)

but that the repayment of said large sum of money was demanded from the Trustee by respondent as the price of surrendering the bankrupt's property to him, after his appointment. (R., bottom 233-234, 242-243.) Notwithstanding these uncontradicted facts, appearing in the record, the respondent boldly refers to this "*fake*" offer to surrender the bankrupt's property to the trustee. (On page 5 of respondent's brief.)

"At least twice after the appointment of the Trustee, first on the 29th day of April, 1945, and second, a month or two later, respondent offered to turn over everything now sought to be recovered by the petition for turnover order to the Trustee who declined to accept it. (R. 138, 139, 143-145, 233-234, 317.)"

Charles L. Surprise testified and was uncontradicted:

"I want to correct my testimony. When Bob Fletcher offered to put on his hat and walk out, it was conditioned that I repay him about $5,000.00 that he claimed to have advanced in the business. That string was tied to it. I forgot that yesterday until I was thinking of it. It just came to me as I was pondering this case." (R. 233-234)

II.

STATEMENT OF FACTS.

1.

Stripped down to the bare essentials, the statement of facts in this cause consists of a fraudulent transaction whereby the bankrupt corporation, through its dominant stockholder and president, within four months of the filing of the petition, conveyed the entire assets of this corporation over to a friend for a mere nominal sum in violation of the Bulk Sales Law of the State of Indiana and, thus, committed an act of bankruptcy under section three (3) of the Bankruptcy Act.

2.

That petitioning creditors for almost three years after tne filing of the petition, served demands, petitions, and engaged in litigation to force the trustee to take the necessary steps to recover these assets so fraudulently conveyed.

3.

The District Court, after being completely informed on the premise, hearing the evidence and rendering judgment in favor of the petitioning creditors, ordered the trustee to file a petition to a Turn Over Order, which was done and the order granted.

III.

ARGUMENT.

Summary of Argument.

A. Respondent's silence, as to the fraudulent nature of this transaction, as found by the District Court, must be taken as an admission, as there is no denial of the charges of fraud by the respondent. Indeed, denial of fraud could not be maintained in the face of the record.

B. The mere fact that this case involves a fraudulent transaction does not and should not of itself demand plenary procedure.

C. Respondent's main case, *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 264 U.S. 426, is not in point and further is outdated in view of the amendments of 1938 to the Bankruptcy Act.

D. The presence of fraud justified the invocation of the equity powers by the District Court, regardless of legal technical excuses.

E. This transaction comes within section 33-201 and section 33-203 of Burn's Indiana Statutes, ann., 1933, which is commonly known as the Bulk Sales Law of Indiana.

The lone case cited by respondent is *Meier Electric & Machine Company* v. *Dixon,* 81 Ind. App. 400, 143 N.E. 363, and is no authority for Point B of respondent's brief. It is not in point, inasmuch as it involves the sale of a hotel.

F. Respondent's invoking the rule of bailments does not help respondent even in a case involving the absence of fraud, inasmuch as a bailee's possession, according to their own case of *Taubel-Scott-Kitzmiller Co.* v. *Fox, supra,* is the possession of the trustee.

G. Respondent is estopped under the rule of landlord and tenant to question his landlord's right to possession.

H. The Circuit Court of Appeals was not justified in rewriting a new set of findings of fact and ignoring the issues presented in the lower court, nor was it justified in invoking section 70b of the Bankruptcy Act to protect a fraudulent transferee.

Argument.

A.

The silence of the respondent's answer brief should be taken as a confession of the flagrantly fraudulent nature of this transaction. The judge of the District Court found that it would be unconscionable to permit the respondent to *"convert"* the entire assets of the bankrupt through this fraudulent transaction.

We believe that this case is very important to the proper administration of the Bankruptcy Act and because of the fraudulent acts involved herein, it stands side by side in importance to the administration of the Bankruptcy Law with:

Sampsell v. *Imperial Paper & Color Corporation,* 313, U.S. 215, and

Pepper v. *Litton,* 308 U.S. 295

and in the other numerous cases where this honorable court has struck down fraud.

The respondent has failed to deny that he is a fraudulent transferee who has been permitted by the Court of Appeals' opinion to delay and defy the District Court in possessing and administering the bankrupt's estate by the device of compelling the trustee to go through long and cumbersome litigation of a plenary nature. The importance of the case which justifies the Supreme Court in granting certiorari is (1) That the court of Appeals' opinion impedes and delays the District Court in possessing and administering the bankrupt's estate. (2) It grants this delay and unfair advantage in favor of one of the *last classes of persons* to whom it should be granted, a Fraudulent Transferee, who got possession through a fraudulent conveyance as an agent, bailee, receiver or tenant, through the bankrupt's president and dominant stockholder shortly before bankruptcy.

B.

The mere fact that this case involved a fraudulent transaction should not and does not of itself demand plenary procedure.

This fraudulent transaction being in violation of the Bulk Sales Law of the State of Indiana, and consisting of the disposal of the entire assets of the corporation within four months before the filing of the petition, amounted to an act of bankruptcy under sub-section (5) of section (3) of the Act, which reads as follows:

> "While insolvent or unable to pay his debts as they mature, procured, permitted or suffered voluntarily or involuntarily the appointment of a *receiver or a trustee* to take charge of his property."

The Indiana law made the *respondent a receiver* at the time of the *transfer*, in contemplation of the Act of Bankruptcy.

It is well settled that the "receiver" referred to under section (3) of the Bankruptcy Act, concerning acts of bankruptcy, does not necessarily mean a receiver which shall have been *appointed* by a court. It is sufficient if such a receivership results as a matter of law or arises by virtue of the law of the State.

Bramwell, Supt. v. *The United States Fidelity & Guaranty Company*, 269 U.S. 486, Sup. Ct. 483.

> "Section 3a (4) of the Bankruptcy Act, as amended February 5, 1903, c. 487, 32 Stat. 797, provides: 'Acts of bankruptcy by a person shall consist of his having * * * (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States.' The fact that banks are not subject to that Act is of no moment. The reference to an act of bankruptcy in sec. 3466 is general, and is for the purpose of defining one of the ways in which the debtor's insolvency may be manifested. The priority *given does not depend on any proceeding under the bankruptcy laws of state or nation.*" (Our emphasis)

This conveyance, being in the nature of an act of bankruptcy and resulting in the appointing of a receiver, assignee, transferee for the assets of the bankrupt corporation, for the benefit of creditors, under the laws of the State of Indiana, invested the Bankruptcy Court with summary jurisdiction over the property held by this respondent. Clause 8 of subsection A (of Sec. 70 of

Act 11, U.S.C.A. sec. 110(a) (8) F.C.A. Title 11 sec. 110 (a) (8):

> "Which provides for the vesting in the trustee of title to property held by an assignee for the benefit of the creditors appointed under an assignment which constituted an act of bankruptcy. It further declares that such property shall be deemed to be held by the assignee as the agent of the bankrupt and shall be subject to the summary jurisdiction of the court."

Because this transfer of all the property of the bankrupt corporation to the respondent took place within four months of the filing of the petition of bankruptcy in this case, the District Court was vested with summary jurisdiction over the property in the hands of the respondent by virtue of:

> Section 2a of Act 11 U.S.C.A. 11(a) (21) F.C.A. Title 11, 11(a) (21),

which,

> "require *receivers* or trustees appointed in proceedings not under this act *assignees for the benefit of creditors and* agents authorized to take possession of, to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act." (Our own emphasis)

Section 21, above, is applicable where such a conveyance of such receivership was brought about within four months of the filing of the petition of bankruptcy. Thus, this fraudulent transaction *falls within the scope of both the* 1938 *amendments* to the Bankruptcy Act, which invested the Bankruptcy Court with additional summary powers.

C.

Respondent's chief case, *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 246 U.S. 426, 4 Sup. Ct. 396:

This case involves an execution lien levied by the sheriff upon property belonging to the bankrupt within four months of the filing of the petition and is therefore not in point, on any possible theory, with the instant case. The statement in regard to summary jurisdiction and the statement of the rule enunciated in this case set out in respondent's brief, on page 20 by the late Honorable Justice Brandeis, *must be construed* in connection with the fact that the brilliant jurist was interpreting the Act of 1898 in an opinion written in 1924 *and it did not take into consideration or envisage the important jurisdictional amendments passed by Congress in* 1938, nor did it take into consideration a situation involving a fraudulent conveyance executed by a corporation through a dominant stockholder and president of the corporation in the kind of a transaction which has been condemned by this court in *Sampsell* v. *Imperial Paper & Color Corp.*, 313 U.S. 215, 61 Sup. Ct. 904 (1941). Neither does the Brandeis statement of the rule envisage or contemplate the inherently equitable powers of the bankrupcy court in a situation where there is a violation of the principles,

> "that powers of a fiduciary such as officer, director or dominant stockholder of a corporation may not be exercised for the aggrandizement preference of advantage of the fiduciary to the exclusion or detriment of the cestuis, equity will undo the wrong or intervene to prevent its consummation."

The above statement of the Rule was enunciated in this court in 1939 in

Pepper v. *Litton*, 308 U.S. 295, 60 Sup. Ct. 238.

D.

The judgment of the District Court should in all things, *including jurisdiction,* be affirmed in this case involving such a fraudulent transaction.

The District Court found in its finding 25 (R. 546) (disregarded by the Appellate Court):

> "The sum of the evidence here indicates that Fletcher stood in a *fiduciary relationship to* the bankrupt corporation. The conclusion is justified by inference, at least, that *Fletcher did not deal at arms length with the corporation* in January, 1945. The president of the corporation had a substantial interest in many of the parcels of real estate which were leased to the bankrupt. He had disagreed with the manager and vice-president of the corporation over the corporate affairs at the time the Fletcher lease was negotiated. The corporation was at least partially paralyzed by governmental action. The lease rental stipulated at fifty dollars per month was, to say the least, improvident.
>
> *The lease provided for a* $5,000 *deposit by the lessee to guarantee his performance of the terms of the lease, but Fletcher, instead of making the deposit with the corporation, deposited the* $5,000 *with the president of the corporation personally. It appears that the respondent, Fletcher, entered the situation at the invitation of an agent of the corporation and agreed to operate a business which had become handicapped by a restraining* order of a government agency. Due possibly to this corporate handicap, Fletcher obtained control of the assets and business of a going concern for a nominal rental. He did not agree to pay the corporate debts, and the agreed rental was wholly inadequate to pay the liabilities and current expenses of the corporation." (Our emphasis)

It is just such a situation with which this court was dealing in *Pepper* v. *Litton, supra,* when it emphasized the rule on the top of page 248 of the Supreme Court Reporter:

> "This alone would be a sufficient basis for the exercise by the District Court of its equitable powers in disallowing the Litton claim. But when there is added the existence of a 'planned and fraudulent scheme,' as found by the District Court, the necessity of equitable relief against that fraud becomes insistent. No matter how technically legal each step in that scheme may have been, once its basic nature was uncovered it was *the duty of the bankruptcy court* in the exercise of its equity jurisdiction *to undo* it. Otherwise, the fiduciary duties of dominant or management stockholders would go for naught; exploitation would become a substitute for justice; and equity would be perverted as an instrument for approving what it was designed to thwart." (Our Emphasis)

This "technical legal refuge," behind section 70b of the Bankruptcy Act by the respondent, was brushed aside by the Judge of the District Court as it should have been by any court of equity.

By its amended opinion of April 12, 1950, the Circuit Court of Appeals has withdrawn its decision on the merits. The court's original opinion, by misinterpreting section 70b of the Bankruptcy Act, wrongfully applied said section to protect a fraudulent transferee in a case where section 70b was inapplicable, not only because of fraud, but because the lease itself or the portion of it which was in controversy was not an *executory contract,* nor had it been rejected, according to the Judge of the District Court.

E.

The respondent has sought to circumvent the results of a violation of the Bulk Sales Law by *feebly contending* that a lease option arrangement such as we have here, does not come within the scope of the Indiana Bulk Sales Law and to support his contention he has cited one *lone Indiana case* dealing with the *sale* of a hotel in Martinsville, Indiana and involving the claim of one creditor for services rendered in the repair of an elevator shaft for the amount of $90.70.

This case *does not involve a lease* and the sale of a hotel was not a bankruptcy matter. Here the Appellate Court of Indiana correctly held that beds, tables and chairs, etc., as equipment of a hotel, does not come within the purview of the *"stock of merchandise"* phrase under the Indiana Bulk Sales Law. This case does not support point B contained on page 21 of respondent's brief, as it does not involve a lease and *is no authority for his statement under point B.*

It should be sufficient to dispose of this contention on the part of the respondent to call this court's attention to sub-section 8 of Exhibit A attached to the Petition for a Turn Over and found in the transcript record page 416:

> "It is further mutually agreed by and between the parties hereto that the Lessee shall purchase the entire stock of gasoline, oil, accessories, batteries, tires, etc., now in the possession of the Lessor as inventoried by the parties at wholesale prices, payment therefor to be made at the time of the completion of such inventory."

The rule in Indiana, we believe, is sufficiently stated in *Van Camp's Hardware & Iron Company* v. *Ellis et al.,*

200 Ind. 582, 198 N.E. 75, where, on page 77 of the N.E. Reporter, the court stated in dealing with a mortgage:

> "The result of the exercise of the rights and powers conferred upon the mortgagee would be to put the property beyond the reach of the creditors of the mortgagor and deprive them of the opportunity to protect their claims * * * the order of the Owen Circuit Court adjudging the appellant to be a receiver under the Bulk Sales Act, is affirmed."

The rule in regard to the type of a transaction which comes under the scope of the Bulk Sales Law and the merchandise clause thereof is set out in 46 A.L.R., p. 979 in *Root Refineries* v. *Gay Oil Co.*:

> "The sale by a corporation engaged in the business of refining petroleum and selling the products in the same way that they are sold by merchants generally, of its entire business and property is within the operation of the Bulk Sales Law."

The same rule is brought forward in 168 A.L.R. 1, p. 766:

> "The rule seems to be universal that wholesalers and distributors of oil and gasoline are within the scope of the Bulk Sales Law provisions as to the *particular form* of the conveyance involved whether it be lease, mortgage or sale, the general rule seems to be that the form of a fraudulent conveyance is immaterial as considered in section 33, parties to a sale cannot be permitted by the form of their agreement to evade the operation of the Bulk Sales Law." (Our emphasis)
>
> 37 C.J.S., section 475, page 1325.

Finding 6 of the District Court reads as follows:

> "Fletcher did not demand or receive from the bankrupt a written list of names and addresses of the creditors of the bankrupt, nor did he at any time ever notify the creditors of the bankrupt of this trans-

action whereby he took possession of the entire business and physical assets of the bankrupt."

By this finding (6) of the District Court, the court found that the respondent did not comply with the Bulk Sales Law of Indiana. (See Bulk Sales Law. Appendix of petition, pages 46-47.)

The respondent's brief stands *significantly silent* as to the fraudulent nature of this transaction. Nowhere does it seek to justify the fraud which existed in this case by virtue of the laws of the State of Indiana and the Bankruptcy Act itself. His feeble attempt to show that the Bulk Sales Law is inapplicable to the present transaction is his only defense to justify the fraud to which he, the respondent, was a party, according to the District Court.

The trustee was seized with the underlying leaseholds and all of its corporate property and assets on the date of his appointment and having been seized with the title and right to possession of said assets, he could not be divested therefrom by any fraud on the part of the dominant stockholder and president of the bankrupt corporation, the respondent appellee herein nor with the acquiescence of any of the officers of the court. *Whitney* v. *Wenman*, 198 U.S. 539.

F.

Respondent's invoking the rule of bailments does not help respondent even in a case involving the absence of fraud, inasmuch as a bailee's possession, according to their own case of *Taubel-Scott-Kitzmiller Co.* v. *Fox*, *supra*, is the possession of the trustee.

In respondent's effort to escape the landlord and tenant rule and the relationship actually existing between the bankrupt corporation and subsequently the trustee and himself, which relationship demands that the respondent, as tenant, must surrender up that which he received under his lease to his landlord before the law will recognize any adverse possession, now, for the first time, seeks to argue that this transaction is not one of "landlord and tenant," but one which sounds in bailments.

He has, however, apparently overlooked the statement contained in *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 4 Sup. Ct. 396, cited on page 20 of respondent's brief where Justice Brandeis said:

> "Constructive possession is sufficient. It exists where the property was in the physical possession of the debtor * * * where the property is in the hands of the bankrupt's agent or bailee;"

C.

Independently of the foregoing facts justifying summary jurisdiction in the court, the fact that the respondent appellee was a tenant of the trustee whose tenancy had expired, made it imperative upon him to surrender the rest of his estate upon the expiration of his tenancy and *that he is powerless to* question his landlord's title or set up an adverse interest to his landlord.

Williams v. *Morris,* 95 U.S. 444.

Lucas v. *Brooks,* 18 Wall. U.S. 436.

Petitioner has amply set out this proposition under subsection "D" on Reasons Relied On for Allowance of Writ., page 34 of petition, and which need not be here repeated.

H.

The Circuit Court of Appeals was not justified in re-writing a new set of findings of fact and ignoring the issues presented to the Trial Court.

The opinion and amended opinion of the Circuit Court of Appeals when fully examined in light of the transcript of record of the issues involved herein constitutes such a departure from the accepted usual course of appellate procedure as to call for the exercise of this Honorable Court's supervisory powers.

The District Court who heard the evidence submitted on the *issues presented,* found this transaction fraudulent both on a matter of law and of equity and placed his stamp of disapproval upon it.

The Circuit Court of Appeals, by eliminating the District Court's findings (6) which found that neither Snyder nor Fletcher complied with the Bulk Sales Law of the State of Indiana and findings 18 and 25 which found the transaction to be fraudulent and condemned it as a fraudulent transaction, was misled into holding that the District Court lacked summary jurisdiction and was misled to such an extent that it was able to find on record page 609 that:

> "No contention is or has been made that this lease was fraudulent."

The fraudulent nature of the lease is the gravamen and essence of this litigation and was the basis of the District Court's judgment. The respondent in his brief, contends that the Appellate Court was justified in making different and contrary findings of fact as to the *fraudulent nature of the transaction other than the District Court made* in this case.

While there may be some instances where the Circuit Court of Appeals would be justified in setting aside findings of fact which from the record are clearly erroneous, still the admitted evidence and the pleadings stamp this transaction as fraudulent as a matter of statutory law both under the laws of the State of Indiana and under the Bankruptcy Act itself.

The statement of the lower court that:

> "No contention is or has been made that this lease was fraudulent"

is puzzling. Such a statement as the above *should hardly be* made in regard to a conveyance of the entire assets of a bankrupt corporation made *within three months* of the filing of the Petition of Bankruptcy which *instantly raises the badges of fraud upon* the transaction and where it violates as this one did, the Indiana Bulk Sales Law. The imprint of fraud is placed upon the action by the Bulk Sales Law itself. As Justice Frankfurter so cogently stated in his dissenting opinion in *Maggio* v. *Zeitz, in re Luma Camera Service, Inc.*, 333 U.S. 56, 68 S. Ct. 401, on bottom of page 418 of the S. Ct. Reporter:

> "The Circuit Court of Appeals did not purport to make an independent evaluation of Maggio's evidence bearing on his incapacity to obey the turnover order. *It was beyond its power to do so.* The Circuit Court was not at large. *Its power was limited to a consideration of the justifiability of the District Court's findings on the basis of the record before that court.*" (Our emphasis.)

Conclusion.

For the above and foregoing reasons, we believe that certiorari should be granted in this case.

Respectfully submitted,

GEORGE COHAN,
Attorney for Petitioner.

End